

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL MISCELLANEOUS No.57099 of 2022

Arising Out of PS. Case No.-137 Year-2012 Thana- KAJI MUHAMMADPUR District-
Muzaffarpur

Dr Durga Shankar S/O Sri Bawani Shankar, resident of Nai Bazar, Ali Mirza Road, Near Bhawani Sankar Vivah Bhawan, Muzaffarpur, at present working as a Doctor in Bhawani Nursing Home, P.S.- Kazi Mohamadpur, District- Muzaffarpur, Bihar

... .. Petitioner

Versus

1. The State of Bihar
2. Sunil Paswan S/O Sri Jai Lal Paswan Resident of Village- Pakri, P.O.- Ladaura, P.S.- Sadar, District- Muzaffarpur, Bihar

... .. Opposite Parties

Appearance :

For the Petitioner/s	:	Mr. Bhairaw Nand Sharma, Advocate
For the Opposite Party/s	:	Mr. Satya Nand Shukla, APP
For Opp. Party No.2	:	Mr. Mazharul Hassan, Advocate

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT

Date : 02-05-2023

This application has been filed by the petitioner for quashing of the order dated 03.02.2016 passed by learned A.C.J.M., 1st East, Muzaffarpur, in Kaji Muhammadpur P.S. Case No. 137 of 2012, by which the learned Magistrate has taken cognizance against the petitioner for the offence under Sections 420 and 308/34 of the Indian Penal Code as well as the order dated 18.08.2022 passed by learned Additional Sessions Judge, XII, Muzaffarpur, in Sessions Trial No. 643 of 2019, by which the discharge petition filed by the petitioner has been rejected.

As per the F.I.R. on 02.05.2012 the mother of the



informant got ill and was taken to Maa Bhawani Hospital and was admitted under the petitioner-Dr. Durga Shankar. It is alleged that according to the doctor, the mother of the informant needed “A positive” blood and the blood was donated by the informant himself. When more blood was needed, it was advised by the doctor that blood may be procured from the blood bank. It is also alleged that the blood was arranged by a staff of the hospital for a cost of Rs.2200/- but when the said blood was transfused in the body the patient, the patient became serious. It is also alleged that when the matter was reported to the petitioner, he did not respond and when the informant went to the pathology department, the person who arranged the blood ran away.

Learned counsel for the petitioner submits that the informant brought his mother to the hospital on 02.05.2012 in a serious condition suffering from jaundice and liver failure. The petitioner duly attended the patient and looking to her condition, she was referred to S.K.M.C.H./P.M.C.H. for proper treatment but on the request of the informant the patient was admitted in the said hospital and advised the informant to arrange the blood from blood bank as the blood in the body of the patient was much less. He further submits that in place of taking required



blood from the blood bank, the petitioner contacted some tout and brought the blood. He further submits that it is well known fact that blood is not sold from any blood bank rather it is exchanged only as per the request of the doctor and after taking the same quantity of blood from the relative/well wishers of the patient.

Learned counsel for the petitioner further submits that the petitioner is a qualified doctor. He got commissioned in the Indian Army and has worked in various prestigious hospitals. He further submits that in the present case as per the direction of the District Magistrate a committee of medical expert has been constituted and the said expert committee visited the hospital and upon investigation it was opined that statement of the informant that his blood was transfused in the body of his mother (mother) does not corroborate with the treatment card of the patient. It was also opined that upon perusal of the medical documents that the patient was suffering from liver failure.

Learned counsel for the petitioner further submits that before lodging the F.I.R. the police did not follow the mandatory guidelines issued by the Hon'ble Supreme Court in the case of *Jacob Mathews vs. State of Punjab & Anr.* reported



in *AIR 2005 SC 3180*.

Learned counsel for the State has opposed this application.

Learned counsel for the informant/opposite party no.2 submits that as per the F.I.R. *prima facie* case is made out against the petitioner and therefore, this application may be dismissed.

I have considered the submissions of the parties. Upon perusal of the materials available on record and the F.I.R. it appears that there is no any material available on record which suggest that the petitioner has cheated or committed negligence while treating the patient. In the case of *Jacob Mathews vs State of Punjab and Anr.* (supra), the Hon'ble Supreme Court has held in paragraph nos. 48 to 52 as follows:-

“48. Conclusions summed up we sum up our conclusions as under:-

(1) Negligence is the breach of a duty caused by omission to do something which a reasonable man guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. The definition of negligence as given in Law of Torts, Ratanlal & Dhirajlal (edited by Justice G.P. Singh), referred to hereinabove, holds good. Negligence becomes actionable on account



of injury resulting from the act or omission amounting to negligence attributable to the person sued. The essential components of negligence are three: 'duty', 'breach' and 'resulting damage'.

(2) Negligence in the context of medical profession necessarily calls for a treatment with a difference. To infer rashness or negligence on the part of a professional, in particular a doctor, additional considerations apply. A case of occupational negligence is different from one of professional negligence. A simple lack of care, an error of judgment or an accident, is not proof of negligence on the part of a medical professional. So long as a doctor follows a practice acceptable to the medical profession of that day, he cannot be held liable for negligence merely because a better alternative course or method of treatment was also available or simply because a more skilled doctor would not have chosen to follow or resort to that practice or procedure which the accused followed. When it comes to the failure of taking precautions what has to be seen is whether those precautions were taken which the ordinary experience of men has found to be sufficient; a failure to use special or extraordinary precautions which might have prevented the particular happening cannot be the standard for judging the alleged negligence. So also, the standard of care, while assessing the practice as adopted, is



judged in the light of knowledge available at the time of the incident, and not at the date of trial. Similarly, when the charge of negligence arises out of failure to use some particular equipment, the charge would fail if the equipment was not generally available at that particular time (that is, the time of the incident) at which it is suggested it should have been used.

(3) A professional may be held liable for negligence on one of the two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not possible for every professional to possess the highest level of expertise or skills in that branch which he practices. A highly skilled professional may be possessed of better qualities, but that cannot be made the basis or the yardstick for judging the performance of the professional proceeded against on indictment of negligence.

(4) The test for determining medical negligence as laid down in Bolam's case [1957] 1 W.L.R. 582, 586 holds good in its applicability in India.

(5) The jurisprudential concept of



negligence differs in civil and criminal law. What may be negligence in civil law may not necessarily be negligence in criminal law. For negligence to amount to an offence, the element of mens rea must be shown to exist. For an act to amount to criminal negligence, the degree of negligence should be much higher i.e. gross or of a very high degree. Negligence which is neither gross nor of a higher degree may provide a ground for action in civil law but cannot form the basis for prosecution.

(6) The word 'gross' has not been used in Section 304A of IPC, yet it is settled that in criminal law negligence or recklessness, to be so held, must be of such a high degree as to be 'gross'. The expression 'rash or negligent act' as occurring in Section 304A of the IPC has to be read as qualified by the word 'grossly'.

(7) To prosecute a medical professional for negligence under criminal law it must be shown that the accused did something or failed to do something which in the given facts and circumstances no medical professional in his ordinary senses and prudence would have done or failed to do. The hazard taken by the accused doctor should be of such a nature that the injury which resulted was most likely imminent.

(8) Res ipsa loquitur is only a rule of



evidence and operates in the domain of civil law specially in cases of torts and helps in determining the onus of proof in actions relating to negligence. It cannot be pressed in service for determining per se the liability for negligence within the domain of criminal law. Res ipsa loquitur has, if at all, a limited application in trial on a charge of criminal negligence.

49. In view of the principles laid down hereinabove and the preceding discussion, we agree with the principles of law laid down in Dr. Suresh Gupta's case (2004) 6 SCC 422 and re-affirm the same. Ex abundanti cautela, we clarify that what we are affirming are the legal principles laid down and the law as stated in Dr. Suresh Gupta's case. We may not be understood as having expressed any opinion on the question whether on the facts of that case the accused could or could not have been held guilty of criminal negligence as that question is not before us. We also approve of the passage from Errors, Medicine and the Law by Alan Merry and Alexander McCall Smith which has been cited with approval in Dr. Suresh Gupta's case (noted vide para 27 of the report).

Guidelines re: prosecuting medical professionals

50. As we have noticed hereinabove that the cases of doctors (surgeons and physicians) being subjected to criminal prosecution are on an increase. Sometimes such prosecutions are filed by private complainants and sometimes by police on an FIR being lodged and cognizance taken. The



investigating officer and the private complainant cannot always be supposed to have knowledge of medical science so as to determine whether the act of the accused medical professional amounts to rash or negligent act within the domain of criminal law under Section 304-A of IPC. The criminal process once initiated subjects the medical professional to serious embarrassment and sometimes harassment. He has to seek bail to escape arrest, which may or may not be granted to him. At the end he may be exonerated by acquittal or discharge but the loss which he has suffered in his reputation cannot be compensated by any standards.

51. We may not be understood as holding that doctors can never be prosecuted for an offence of which rashness or negligence is an essential ingredient. All that we are doing is to emphasize the need for care and caution in the interest of society; for, the service which the medical profession renders to human beings is probably the noblest of all, and hence there is a need for protecting doctors from frivolous or unjust prosecutions. Many a complainant prefers recourse to criminal process as a tool for pressurizing the medical professional for extracting uncalled for or unjust compensation. Such malicious proceedings have to be guarded against.

51. Statutory Rules or Executive Instructions incorporating certain guidelines need to be framed and issued by the Government of India and/or the State Governments in consultation with the Medical Council of India. So long as it



is not done, we propose to lay down certain guidelines for the future which should govern the prosecution of doctors for offences of which criminal rashness or criminal negligence is an ingredient. A private complaint may not be entertained unless the complainant has produced prima facie evidence before the Court in the form of a credible opinion given by another competent doctor to support the charge of rashness or negligence on the part of the accused doctor. The investigating officer should, before proceeding against the doctor accused of rash or negligent act or omission, obtain an independent and competent medical opinion preferably from a doctor in government service qualified in that branch of medical practice who can normally be expected to give an impartial and unbiased opinion applying Bolam's test to the facts collected in the investigation. A doctor accused of rashness or negligence, may not be arrested in a routine manner (simply because a charge has been levelled against him). Unless his arrest is necessary for furthering the investigation or for collecting evidence or unless the investigation officer feels satisfied that the doctor proceeded against would not make himself available to face the prosecution unless arrested, the arrest may be withheld."

In view of the above observations of the Hon'ble Supreme Court coupled with the fact that the expert committee in its report has opined that the version of the informant that his blood was transfused in the body of her mother is not proved



and the patient was suffering from liver failure and on going through the materials available on record it does not appear that the petitioner has cheated or committed negligence while treating the patient, inasmuch as, it is also not in dispute that the petitioner is not a qualified doctor, I am of the view that the prosecution against the petitioner cannot continue and it is an abuse of the process of the Court.

Accordingly, this application is allowed and the F.I.R. vide Kaji Muhammadpur P.S. Case No. 137 of 2012 and all consequential proceedings arising out of the aforesaid F.I.R. including the order dated 03.02.2016 passed by learned A.C.J.M., 1st, East, Muzaffarpur as well as order dated 18.08.2022 passed by learned Additional Sessions Judge, XII, Muzaffarpur are hereby quashed in the interest of justice.

(Sandeep Kumar, J)

pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	N/A
Uploading Date	15.05. 2023
Transmission Date	15.05.2023

